complying union. Members Herzog and Houston, dissenting, expressed the view that an employer be relieved of an obligation to bargain with a non-complying union only if he contemporaneously asserts non-compliance as his reason for refusing to bargain. Petitioner asserted precisely this ground for its refusal to bargain on September 19, 1947.

In *New Jersey Carpet Mills Co.*, 92 NLRB No. 122, 27 LRRM 1114, decided December 11, 1950, the Board modified its earlier view but it is evident that a majority of the Board—as of December 11, 1950—would still hold that in the circumstances of this case (i.e., where the employer assigns non-compliance as a reason) petitioner's refusal to bargain did not constitute an unlawful refusal to bargain if the Union was not in fact in compliance. Consequently, we perceive no useful purpose to be served by a postponement of action predicated upon a possible remand to the Board to decide a question which it has twice indicated it would decide in petitioner's favor.

II

The Board's suggestion to defer action on this petition is also based upon its assertion that apart from the Section 9(h) issues there are no other issues in this case which warrant further review by this Court. It states (Memo., p. 10):

> "3. In holding that the Board properly attributed any loss of majority *which followed* the refusal to bargain to that unfair labor practice, the Court below correctly applied a principle long established by this Court. (Italics supplied)."

But this statement of the proposition assumes a state of fact which finds no evidential support in this record and is refuted by all the evidence in the record.

The Board asserts that the union's loss of majority *followed* petitioner's September 19, 1947 refusal to bargain.[2]

[2] See also the Board's formulation of the 4th Question Presented. (Memo. p. 3).

There is not one shred of evidence in the record to support this assertion. There is an abundance of evidence which shows that the loss of majority occurred *prior* to the refusal to bargain on September 19, 1947.

In these circumstances, we urge that an important question in the administration of the Act is presented: May the Board presume a fact—i.e., the causal relationship between an employer's refusal to bargain and a union's loss of majority—without any evidence, substantial or otherwise, to support the presumption and in the face of evidence which wholly negates the possibility of such a causal relation? An affirmative answer to this question was not, in our reading of the cases, ever established by this Court under the Wagner Act and, in any case, the question cannot be so answered in the light of the 1947 amendments to that Act. It is wholly separate from the question of statutory interpretation of Section 9(h) and independently warrants issuance of the writ requested.

CONCLUSION

For these reasons we oppose the Board's suggestion for deferring action on the petition for a writ of certiorari.

Respectfully submitted,
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